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No. 97-1121

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CITY OF CHICAGO,

Petitioner,

v.

JESUS MORALES, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Illinois

BRIEF *AMICI CURIAE* OF CHICAGO NEIGHBORHOOD ORGANIZATIONS IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the right to loiter on public streets with members of a criminal street gang is one of the traditional "amenities of American life" that, under principles of "substantive due process," may not abridged by a police order to disperse.

2. Whether an ordinance that (i) specifically defines "loitering" and "criminal street gangs," (ii) authorizes police to order the dispersal of a group of loiterers when there is probable cause to believe that members of criminal street gangs are among the group, and (iii) permits the arrest of those loiterers who disobey the order to disperse, is so lacking in clarity that it is void for vagueness in all of its applications.

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BRIEF *AMICI CURIAE* OF CHICAGO NEIGHBORHOOD ORGANIZATIONS IN SUPPORT OF PETITIONER

Amici curiae Chicago Neighborhood Organizations respectfully submit this brief in support of petitioner, the City of Chicago.[1]

INTEREST OF *AMICI CURIAE*

Amici curiae are a number of neighborhood organizations and community groups in the City of Chicago. *See* App., *infra*. *Amici* represent concerned Chicago citizens and voters who are actively involved in identifying and implementing programs to stem the epidemic of drug abuse, violence, and

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[1] Pursuant to this Court's Rule 37.2(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

other gang-related criminal activities that plague their neighborhoods and our Nation's urban areas generally. *Amici* are concerned that the Illinois Supreme Court's decision unreasonably thwarts the reasoned determination by the people's elected representatives that responsible community-based policing of members of criminal organizations can prevent and deter gang-related crime in Chicago.

Amici represent the interests of the very people for whom the gang-loitering ordinance was enacted: They live in many of the Chicago communities hit hardest by gang-related crime, and are afraid to walk about in their own neighborhoods as a result of gang-related crime and violence. They saw firsthand that the ordinance, before it was declared unconstitutional, improved the quality of life in their communities.

Amici believe that community policing generally, and particularly the gang-loitering ordinance under review, benefits *all* residents of the communities in which gangs are active, including both law-abiding citizens and the young people—their children, siblings, and relatives—who are most at risk from the dangers of gang membership. Moreover, *amici* see no constitutional infirmity in reasonable efforts to rid their streets of the scourge of criminal street gangs, and they support the City's efforts to reinstate and enforce the ordinance that was enacted explicitly to safeguard the safety, security, and liberty of their members.

STATEMENT

1. Recent years have seen a dramatic change in the way many big-city police departments respond to criminal behavior. Rather than focusing solely on solving serious crimes that already have occurred, police increasingly take measures to prevent crime before it happens. Police intervention in relatively small-scale disorder—for example, preventing rowdy, drunken and antisocial behavior; eradicating graffiti, litter and vandalism; and enforcing curfew, cruising and loitering laws—has been shown to make neighborhoods safer

places and to reduce the incidence of more serious criminal activity.[2]

The increasingly prevalent strategy of using police to maintain order in urban communities, in addition to the traditional police role of solving serious crimes, generally is referred to as "community policing."[3] Although the concept can be implemented through a variety of means, a central tenet of community policing is that "working partnerships between the police and the community can play an important role in reducing crime and promoting security."[4] In other words, "[i]t promises that police will be responsive to the expressed needs of the communities they serve."[5]

A principal impetus for the community policing movement is the common-sense notion that there is less crime in orderly neighborhoods. As a leading article explained, "if a

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[2] For example, New York City police implemented such a program in 1993, focusing on such low-level offenses as vandalism, panhandling, public drunkenness, unlicensed vending and prostitution. In the ensuing several years, this strategy proved to be effective in reducing the level of serious crime: The murder rate dropped nearly 40 percent, the robbery rate more than 30 percent, and the burglary rate more than 25 percent. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 Va. L. Rev. 349, 367 (1997). Crime in New York is decreasing at more than twice the national average, and is at its lowest level in more than 25 years. "City officials and at least some criminologists credit the larger reduction in crime rates to [the] recent emphasis on 'order maintenance.'" *Id.* at 368-369; *see* Kelling & Coles, *Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities* 151-156 (1996).

[3] *See* Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum. L. Rev. 551, 573-578 (1997).

[4] Moore, *Problem-Solving and Community Policing*, in Tonry & Morris, eds., *Modern Policing* 99, 123 (1992).

[5] Skogan, *Disorder and Decline: Crime and the Spiral of Decay in American Neighborhoods* 90 (1990).

window in a building is broken and left unrepaired, all the rest of the windows will soon be broken. . . . [O]ne unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing."[6] Signs of disorder in public streets—*e.g.*, broken windows, litter, drunks or drug addicts slumped on the sidewalk, or loitering gang members—cause the law-abiding public to avoid public rights of way and thus severely dilute the kinds of informal social checks that traditionally have permitted all of us to look after each other and to keep our streets safer. "[I]t is more likely that here, rather than in places where people are confident they can regulate public behavior by informal controls, drugs will change hands, prostitutes will solicit, and cars will be stripped."[7] Community policing is thus founded on the notion that "the police ought to protect communities as well as individuals," and that, accordingly, "the police—and the rest of us—ought to recognize the importance of maintaining, intact, communities without broken windows."[8]

2. In 1992, the Chicago City Council held extensive hearings on the vexing public-safety problems posed for that city's residents by criminal street gangs. After extensive testimony from law enforcement and from community residents who lived under the terror created by those gangs, the City Council found that "the continuing increase in criminal street gang activity in the City [was] largely responsible" for an "increasing murder rate as well as an increase in violent and drug related crimes," and that "the burgeoning presence of street gang members in public places has intimidated many law abiding citizens." Pet. App. 60a.

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6 Wilson & Kelling, *Broken Windows*, The Atlantic Monthly 29, 31 (Mar. 1982) (emphasis omitted).

7 *Id.* at 32.

8 *Id.* at 38.

The City Council specifically found that, apart from "creat[ing] a justifiable fear for the safety of persons and property in the area" (*ibid.*), loitering involving members of criminal street gangs furthered the gangs' criminal activities in two important and distinct ways. First, gang members "avoid arrest" for their street crimes by eschewing overt criminality and simply loitering "when they know the police are present." *Ibid.* Second, loitering is indispensable to the notion of gang "turf"—*i.e.*, the assertion by a particular criminal gang of the right to *control* a given area of the City to the detriment of competing gangs and the members of the law-abiding public—because "[o]ne of the methods by which criminal street gangs establish control over identifiable areas is by loitering in those areas and intimidating others from entering those areas." *Ibid.*

In view of those findings, the City Council adopted an ordinance authorizing police officers to order gang members who are loitering in public areas (or those loitering with them) to disperse, and to arrest those who refuse to do so:

> Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

Pet. App. 61a. The ordinance carefully defined each of its operative terms. The phrase "criminal street gang" was defined to require, among other things, an organization engaged in a pattern of specifically identified state crimes. Pet. App. 61a-62a. The term "loiter" was defined as "to remain in any one place with no apparent purpose." Pet. App. 61a.

In addition, the Chicago Police Department adopted detailed guidelines governing the enforcement of the gang-loitering ordinance. The ordinance was enforced only in "areas frequented by members of criminal street gangs which, because of their location, significantly affect the ac-

tivities of law-abiding persons in the surrounding community." Pet. App. 68a. Such areas were to be designated after consultation with "local officials, leaders of local community organizations, and other citizens likely to be able to provide reliable information." *Ibid.* Thus, in the finest spirit of community policing, the police explicitly entered into a partnership with neighborhood residents to identify those areas in which gangs were destroying the fabric of community life, and to enforce the ordinance in those areas to enhance the security and safety of all residents.

3. Respondents were separately arrested for disobeying a police order to disperse or "move along" under Chicago's gang-loitering ordinance and challenged the validity of the ordinance on numerous constitutional grounds. After separate proceedings in the lower state courts, the Supreme Court of Illinois consolidated respondents' challenges and agreed with respondents that the ordinance is inconsistent with the federal Constitution.

The court first concluded that the ordinance is void for vagueness. Pet. App. 6a-17a. The court explained that, even though the term "loiter" is specifically defined by the ordinance as "remain[ing] in one place with no apparent purpose," the term fails to give persons of ordinary intelligence sufficient notice of what is prohibited, because "[p]eople with entirely legitimate and lawful purposes will not always be able to make their purposes apparent to an observing police officer." Pet. App. 10a. That infirmity was not cured, in the court's view, by the requirement that the officer have probable cause to believe that one of the loiterers is a gang member, by the fact that it is a legal defense under the ordinance that no member of the group was in fact a gang member, or by the fact that prosecution is possible only if the defendant disobeys a clear order to disperse. As the court saw it, the city may not criminalize even a defendant's *knowing* participation in, or association with, criminal street gangs (Pet. App. 12a), and it may not confer on police authority to

disperse loiterers "if the underlying statute is itself impermissibly vague." Pet. App. 13a.

The court also concluded that the purported "vagueness" of the ordinance improperly encouraged "arbitrary and discriminatory enforcement" Pet. App. 14a. In this connection, the court was especially critical of the Chicago Police Department's effort to set forth specific written guidelines for enforcing the ordinance, a step that the court conceded was contemplated by the City Council, because in the court's view "lawmakers may not abdicate their responsibilities for setting the standards of the criminal law." Pet. App. 15a.

Finally, the court emphasized that Chicago's ordinance "is an arbitrary exercise of the city's police power and, thus, violates substantive due process." Pet. App. 17a. The court believed that its conclusion was compelled by *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972), which, in the court's view, stood for the proposition that the type of loitering prohibited by the ordinance is one of the traditional "amenities of American life." Pet. App. 17a (citing *Papachristou*, 405 U.S. at 164). The "amenities" invaded by the Chicago ordinance, in the court's view, included "the general right to travel, the right of locomotion, the right to freedom of movement, and the general right to associate with others." Pet. App. 18a (citations omitted).

In light of its conclusion that the gang loitering ordinance violates due process, the court found it unnecessary to examine respondents more specific claims under the First, Fourth, and Eighth Amendments. Pet. App. 5a, 19a.

REASONS FOR GRANTING THE PETITION

The Supreme Court of Illinois concluded in this case that the right to loiter with members of criminal street gangs is an "amenit[y] of American life" that includes a plethora of rights that are protected from government intervention by principles of "substantive due process." Pet. App. 17a-18a. The court also concluded that Chicago's gang loitering ordinance is an "arbitrary restriction" of those rights (Pet. App.

19a), because its purported "vagueness" encourages arbitrary law enforcement. Pet. App. 18a-19a, 14a-15a. Those conclusions, in the court's view, obviated any need to consider respondents' claims that the ordinance violates specific provisions of the Bill of Rights.

Neither the mode of analysis employed, nor the conclusions reached, by the Illinois Supreme Court can be reconciled with this Court's cases. This Court's precedents *forbid* the invocation of "substantive due process" in contexts already addressed by specific provisions of the Bill of Rights. The court below, however, neatly avoided respondents' claims under the Bill of Rights, which were obviously meritless, and awarded them relief on essentially the same allegations simply by inventing *broader* rights under the guise of "due process." The court similarly misused the narrow due process doctrine of vagueness, which is addressed to the *clarity* of legislation, to invalidate an ordinance that is unquestionably clear but that the court believed was, as a policy matter, *too broad*. Again, however, the breadth of legislation is cause for its invalidation *only* when it is shown that such legislation reaches substantial amounts of *constitutionally protected* conduct—*i.e.*, only upon analysis of the very questions under the Bill of Rights that the court below expressly refused to address. Because the erroneous ruling below exacerbates longstanding conflicts about the permissible scope of loitering and other community policing ordinances, and effectively disables an entire State of the Union from addressing a pressing social problem, this Court's review is clearly warranted.

1. The mode of analysis employed by the Supreme Court of Illinois put the cart before the proverbial horse. This Court has repeatedly made clear that if an "explicit textual source of constitutional protection" applies, government action must be analyzed under that standard "rather than under a 'substantive due process' approach." *Graham* v. *Connor*, 490 U.S. 386, 395 (1989). In *Graham*, the Court applied that principle to hold that substantive due process has

no place in analyzing claims that police used "excessive force" during an arrest, which must instead be gauged *solely* under the Fourth Amendment. As the Court put it, "[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Id.* at 395.

The Court reaffirmed that principle in *Albright* v. *Oliver*, 510 U.S. 266 (1994), which rejected the notion that substantive due process embodies some right to be free from "arbitrary" prosecutions. As the Chief Justice explained, "[i]t was through [the] provisions of the Bill of Rights that their Framers sought to restrict the exercise of arbitrary authority by the Government in particular situations." *Id.* at 273 (plurality). Thus, the Court concluded, only the specific Amendment that addresses the "particular sort of government behavior," rather than notions of substantive due process, should be applied to claims challenging that particular behavior. *Ibid.*; *see also id.* at 288-289 (Souter, J., concurring in judgment) (applying general "rule of reserving due process for otherwise homeless substantial claims"). And only last Term, the Court unanimously emphasized that "if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *United States* v. *Lanier*, 117 S. Ct. 1219, 1228 n.7 (1997).[9]

The decision below got that principle exactly backwards, because it expressly refused to address the specific provi-

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[9] *See, e.g., Mays* v. *City of St. Louis*, 123 F.3d 999 (7th Cir. 1997) (Fourth Amendment alone controls conduct of police officer who gave chase that resulted in death); *Armendariz* v. *Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc) (Just Compensation Clause, not due process, controls claims for inverse condemnation).

sions of the Bill of Rights that speak to respondents' claims and resolved those claims instead by reference to the amorphous requirements of "substantive due process." That is a key error, because it is obvious from this Court's cases that Chicago's ordinance offends *none* of the provisions of the Bill of Rights that the ordinance implicates. Because the Bill of Rights speaks to—and does not invalidate—the bulk of the governmental conduct that the court below found objectionable, its "requirements are not to be supplemented through the device of 'substantive due process.'" *Albright*, 510 U.S. at 276 (Scalia, J., concurring).

The most germane provision of the Bill of Rights is, of course, the Fourth Amendment. As Judge Easterbrook recently noted, it is clear that this "Court has looked exclusively to the fourth amendment for substantive limits to searches and seizures," *Mays*, 123 F.3d at 1002 (emphasis added), attempted seizures, *see California* v. *Hodari D.*, 499 U.S. 621 (1991), and even entirely consensual encounters in which police purportedly communicate to a citizen that "he [is] not at liberty to ignore the police presence and go about his business." *Florida* v. *Bostick*, 501 U.S. 429, 437 (1991).

Chicago's ordinance is fully consistent with the Fourth Amendment. Even if an officer's order to disperse could be considered a "seizure," *but see Brower* v. *County of Inyo*, 489 U.S. 593 (1989), Chicago police will issue such an order *only* "when there is *probable cause* to believe that criminal street gang members are loitering in a designated area." Pet. App. 72a (emphasis added). The existence of probable cause objectively justifies the minimal intrusion on individual liberty that the Chicago ordinance contemplates, and it accordingly constitutes the best guarantee of "evenhanded law enforcement." *Horton* v. *California*, 496 U.S. 128, 138 (1990); *compare Brown* v. *Texas*, 443 U.S. 47, 50-53 (1979) (invalidating "stop and identify" statute under the Fourth Amendment, because statute did not require officer to have probable cause or reasonable suspicion). That point was unanimously emphasized by the Court only two years ago,

when this Court rejected the claim that the vehicular traffic laws are so broad and pervasive that they essentially license "the police to single out whomever they wish for a stop." *Whren* v. *United States*, 116 S. Ct. 1769, 1777 (1996). As the Court emphasized in *Whren*, the existence of probable cause is sufficient to justify interference with an individual's freedom of movement, since "the usual rule [is] that probable cause to believe the law has been broken 'outbalances' private interest in avoiding police contact." *Ibid.*[10]

While this Court's cases recognize that particular governmental conduct may implicate more than one "textual source" of protection, *Soldal* v. *Cook County*, 506 U.S. 56, 70 (1992); *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 49-50 (1993), respondents' claims are even more implausible when examined in light of other provisions of the Bill of Rights. Chicago's ordinance does not create a "status" offense (Pet. App. 5a), because it requires affirmative volitional *conduct*—loitering, membership in (or association with) a criminal street gang, and disobedience of a police order. *See Powell* v. *Texas*, 392 U.S. 514, 533 (1968). Nor does the ordinance interfere with associational rights protected by the First Amendment. Standing on a street corner with members of a criminal street gang "might be described as 'associational' in common parlance," but loitering "simply do[es] not involve the sort of expressive association that the First Amendment has been held to protect." *Dallas* v. *Stanglin*, 490 U.S. 19, 24 (1989). Rather, the activity proscribed by the ordinance is analogous to "walking down the street or meeting one's friends at a shopping

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[10]Indeed, the Court expressly disclaimed the *ability* to engage in the sort of open-ended review that the court below adopted here under the guise of "substantive due process": "[W]e are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement." *Whren*, 116 S. Ct. at 1777.

mall"—which this Court has held outside the ambit of First Amendment protections. *Id.* at 25. Just as the Constitution does not recognize a "generalized right of 'social association' that includes chance encounters in dance halls" (*ibid.*), it does not create any right of "criminal association" that includes the right to remain on a street "with *no* apparent purpose" *other* than to associate with a "criminal street gang."

The proper mode of constitutional analysis, therefore, demonstrates that Chicago's ordinance does not violate any of the textual provisions it arguably implicates. Those textual provisions, "not the more generalized notion of 'substantive due process'" (*Graham*, 490 U.S. at 395), must therefore control respondents' assertion that Chicago's ordinance unduly invades their liberty interests in remaining on a public street without police interference. And, as demonstrated below, this Court's cases make it absolutely clear that the ordinance is also consistent with the requirement of "fair warning"—the *only* remaining liberty interest that was identified by the Supreme Court of Illinois *and* has been recognized by this Court's cases.

2. "The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." *Albright*, 510 U.S. at 272 (plurality).[11] This Court's reluctance

[11] The "rights" of loiterers that the Chicago ordinance purportedly infringes are, needless to say, "markedly different from those recognized in this group of cases." *Albright*, 510 U.S at 272. While this Court has recognized a limited constitutional right to *interstate* travel—"or, more precisely, the right of free interstate migration" (*Attorney General of N.Y.* v. *Soto-Lopez*, 476 U.S. 898, 902 (1986))—it has never held that the Constitution prohibits restrictions on intrastate (much less intracity) travel. *Cf. Hodgson* v. *Minnesota*, 497 U.S. 417, 435 (1990). The Court certainly has never recognized a constitutional right to travel—or "locomote," or "move around"—sufficiently elastic to comprehend a "right" to "remain in one place with no apparent purpose" other than to congregate with criminal street gangs.

to invoke "substantive due process" has nowhere been more pronounced than in matters touching on what conduct States choose to make criminal. States enjoy wide latitude in this area, *see, e.g.*, *Martin* v. *Ohio*, 480 U.S. 228, 232 (1987), and courts therefore "should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Medina* v. *California*, 505 U.S. 437, 445 (1992); *Montana* v. *Egelhoff*, 116 S. Ct. 2013, 2024-2025 (1996) (Ginsburg, J., concurring in judgment). A State's decision in this regard is not subject to due process challenge unless it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina*, 505 U.S. at 445; *Egelhoff*, 116 S. Ct. at 2025 (Ginsburg, J., concurring in judgment). And, of course, it is respondents' burden to establish affirmatively that the ordinance they challenge transgresses fundamental principles of justice. *See Egelhoff*, 116 S. Ct. at 2019 (plurality). This they cannot do.

The *only* "firmly rooted" principle recognized by this Court that relates to respondents' claims here is the requirement of "fair warning " embodied in the void-for-vagueness doctrine. Contrary to the apparent assumption of the Illinois Supreme Court, however, the vagueness doctrine—like other due process doctrines—does not give the judiciary "a 'chancellor's foot' veto over law enforcement practices of which it [does] not approve." *United States* v. *Russell*, 411 U.S. 423, 435 (1973). As this Court made clear only last Term, the essence of vagueness review is simply the requirement of "fair warning," which centers on the use of "language that the common world will understand[] of what the law intends to do if a certain line is passed." *Lanier*, 117 S. Ct. at 1224 (quoting *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931) (Holmes, J.)); *see also Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983). Accordingly "the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Lanier*, 117 S. Ct. at 1225.

The gang-loitering ordinance easily meets that standard. It clearly defines membership in a "criminal street gang" by reference to a "pattern" of expressly identified state crimes. *Cf. Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 59 n.7 (1989) (noting that state RICO statute's "pattern" requirement is "inherently *less* vague" than underlying crimes). The ordinance also clearly informs citizens of the prohibited conduct: "[R]emaining in one place with no apparent purpose" in the company of one or more members of a "[c]riminal street gang." App. 61a. Ordinary people are perfectly capable of understanding what the ordinance proscribes. Lest there be any doubt, however, an arrest can be made only after a police officer *informs* the loiterers of their legal obligations under the ordinance and they refuse a lawful order to disperse. There can be no question but that a person in those circumstances "should understand that he could be convicted . . . if he fails to obey an order to move on." *Colten* v. *Kentucky*, 407 U.S. 104, 110 (1972); *cf. Schenck* v. *Pro-Choice Network*, 117 S. Ct. 855, 869-870 (1997) (defendants, to whom injunction was specifically directed, "certainly" were given "a reasonable opportunity to know what was prohibited").[12]

In reaching the opposite conclusion, the Illinois Supreme Court placed nearly dispositive, but mistaken, reliance on two passages from *Papachristou*. The first passage referred to "amenities of life" that are "not mentioned in the Constitution or in the Bill of Rights" but that nonetheless may be elements of due process. 405 U.S. at 164; *see* Pet. App. 17a. That passage, however, is not a license for lower courts to

[12] It simply blinks reality to suggest that the aldermen, the police, the general public, and especially the gang members themselves do not know what the Chicago ordinance outlaws. Indeed, unless the opinion below is an exercise in disingenuity, the justices of the state supreme court may be the only people in Illinois who do *not* know what it means.

discover those "amenities" on their own and in the teeth of the methodology prescribed by this Court in *Graham, Albright,* and *Lanier*; indeed, only the most benighted view of what "historically [has been] part of" those "amenities" (*Papachristou*, 405 U.S. at 164) could lead to the conclusion that loitering with criminal gangs is among them. In the second passage on which the court below relied, *Papachristou* emphasized that the activities outlawed by Jacksonville's ordinance "by modern standards are normally innocent." *Id.* at 163; Pet. App. 9a. As its context makes clear, however, nothing in that passage purported to confer on the lower courts unguided discretion to second-guess legislative judgments that specific conduct is *not* "innocent"—the Court's point was simply that an ordinance's lack of clarity is an especial source of concern when the ordinance is applied to conduct that a citizen would not otherwise recognize as culpable. *See Papachristou*, 405 U.S. at 162-163 (emphasizing need for "fair notice"). As already demonstrated, lack of *clarity* is not a failing that can fairly be ascribed to Chicago's ordinance.

Indeed, the Illinois Supreme Court's real difficulty with the ordinance apparently was not that it is unclear, but that it is too *broad*:

> The city has declared gang members a public menace and determined that gang members are too adept at avoiding arrest for all the other crimes they commit. Accordingly, the city council drafted an exceptionally broad ordinance which could be used to sweep these intolerable and objectionable gang members from the city streets.

Pet. App. 16a. Overbreadth is, of course, a distinct constitutional doctrine. Like vagueness, however, it is limited in reach.[13] This Court has made clear that a legislative enact-

[13] The repeated citation by the court below of *Shuttlesworth* v. *Birmingham*, 382 U.S. 87 (1965), an overbreadth case, suggests that the

ment can be declared unconstitutionally "overbroad" only if it "prohibits constitutionally protected conduct." *Grayned* v. *City of Rockford*, 408 U.S. 104, 114 (1972). Indeed, this Court "ha[s] not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). Because the ordinance does not infringe on any First Amendment interests, and violates no other specific provision of the Constitution, its mere breadth cannot serve as a basis for facial invalidation.

In any event, the Chicago Police have prepared detailed guidelines for the enforcement of the ordinance, which eliminate any difficulty the broad language of the ordinance itself might pose. Pet. App. 64a-73a. The court below rejected those guidelines on the ground that "[i]t is the duty of the lawmakers to establish minimal guidelines to govern law enforcement." Pet. App. 16a. But nothing in our Constitution governs the manner in which States, or local governments, allocate their legislative functions. *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U.S. 608, 612-613 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself"); *Dreyer* v. *Illinois*, 187 U.S. 71, 83-84 (1902) (due

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court below did not see any significance distinction between the two doctrines. *See* Pet. App. 8a, 12a-13a. The ordinance at issue in *Shuttlesworth*, however, made it a crime "to stand *or* loiter upon any street or sidewalk . . . after having been requested by any police officer to move on." 382 U.S. at 90. The Court's concern was primarily with the blanket prohibition on "standing" on a public street, which was permeated "with [an] ever-present potential for arbitrarily suppressing First Amendment liberties." *Id.* at 90-91. Indeed, the Court noted that the ordinance had been narrowed since the events in that case. Once the ordinance was narrowed to apply to loiterers who obstructed free passage and "refused to obey a request by an officer to move on," the Court could "not say that the ordinance is unconstitutional." *Id.* at 91.

process does not require separation of state powers). This Court frequently looks to administrative constructions in determining whether state statutes are vague. *See, e.g., Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) ("In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court *or enforcement agency* has proffered") (emphasis added).

The police guidelines were adopted not only to narrow the breadth of the ordinance, but to avoid any possibility of arbitrary enforcement: "In order to ensure that the anti-gang loitering is not enforced in an arbitrary or discriminatory way, this directive [establishing the guidelines] establishes limitations on the enforcement discretion of Department members, and thereby provides for enforcement of the ordinance in a fair and principled way." Pet. App. 65a. Even a cursory review of the numerous and detailed discretion-guiding provisions of the police guidelines demonstrates that officers on the street have less discretion in enforcing the ordinance than they do, for example, in enforcing the traffic laws. The Court must presume that the police officers who enforce the gang-loitering ordinance, and the prosecutors and courts who will thereafter review those officers' work, will do so fairly. *See, e.g., United States* v. *Mezzanatto*, 513 U.S. 196, 210 (1995); *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926).

3. The questions presented are important, and the decision below reflects profound confusion in the lower courts regarding the constitutionality of community policing laws. "[C]ourts have reached conflicting results in several recent cases assessing facial vagueness challenges to the efforts of legislatures and city councils to fashion new forms of police authority to deal with neighborhood problems," including prohibitions on loitering. Livingston, *supra*, at 558. Loitering statutes are upheld in some jurisdictions and struck down in others. *Compare, e.g., E.L.* v. *State*, 619 So. 2d 252 (Fla. 1993) (holding loitering ordinance unconstitutional), *with*,

e.g., *City of Tacoma* v. *Luvene*, 827 P.2d 1374 (Wash. 1992) (sustaining constitutionality of similar ordinance); *see* Pet. 14-16 & nn. 9-12.

The Chicago gang-loitering ordinance is only one of many legislative implementations of the new community policing methods. Yet the Illinois Supreme Court held, erroneously, that the Chicago ordinance is unconstitutional. The decision below casts doubt on the constitutionality of a broad range of community policing laws, and will deter other cities and States from experimenting with reducing crime by controlling disorder. Other courts, by contrast, have sustained the constitutionality of restrictions similar to those imposed by the Chicago ordinance. *See People ex rel. Gallo* v. *Acuna*, 929 P.2d 596 (Cal. 1997) (rejecting constitutional challenges to injunction prohibiting gang-related conduct), *cert. denied*, 117 S. Ct. 2513 (1997).[14]

Indeed, a comprehensive review of this area of the law indicates a "confused pattern of decisions," an "erratic and confusing body of case law," an "overall pattern of decisions" that is "erratic, fractured, and confusing," an "erratic pattern of the vagueness cases in this area," and a "problem posed by the fractured case law." Livingston, *supra*, at 561, 610, 628, 629, 631. The lower courts have reached conflicting results in considering the limits the Constitution places on increased police interaction with the community in an effort to redress relatively low-level street crime and disorder.

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[14] The *Acuna* court upheld, as against vagueness, overbreadth and First Amendment challenges (among others), an injunction that prohibited gang members from "[s]tanding, sitting, walking, driving, gathering or appearing anywhere in public with" any other gang members. 929 P.2d at 608. The Supreme Court of California's judgment can scarcely be reconciled with the conclusions reached by the Supreme Court of Illinois here, given that injunctions are generally tested under *more stringent* constitutional requirements than ordinances. *See Madsen* v. *Women's Health Center, Inc.*, 512 U.S. 753, 764-765 (1994).

The source of the confusion among the lower courts is this Court's decision in *Papachristou*. The Court in that case struck down a Florida loitering statute as void for vagueness, but gave little guidance as to how the vagueness doctrine, or other constitutional restraints, should be applied in reviewing public order laws. "Disparate results in later cases were the predictable outcome." Livingston, *supra*, at 628. Courts reviewing the constitutionality of community policing laws have reached differing results depending on the breadth they ascribe to the ruling in *Papachristou*.

Many courts, including the Illinois Supreme Court, have given *Papachristou* an extraordinarily expansive reading, striking down even narrowly tailored laws designed to enhance public safety. This approach not only is fundamentally at odds with this Court's modern approach to due process, but also unnecessarily hampers state and local governments in their efforts to reduce crime by implementing community policing standards. Legislative bodies across the country increasingly are turning to the new policing methods, recognizing that frequent interaction between the police and the community is not only necessary but desirable.

Chicago's gang-loitering ordinance, for example, sprang from the demands of the City's residents—primarily from poor, minority communities—to rid their neighborhoods of the drive-by shootings, fighting, and drug dealing that attend criminal street gangs. It was passed by an overwhelming margin by the City Council, with crucial support from aldermen representing the most crime-ridden areas. And the Chicago ordinance is hardly unique: "Loitering legislation in the 1990s has often had broad community support, particularly in some predominantly-minority communities plagued by street-level drug dealing." Livingston, *supra*, at 623. The residents of such communities understand full well that the kids the police can't order off the streets today are the same ones who will be taken off to jail tomorrow, if they are not taken to the emergency room or the morgue first.

This case presents an ideal vehicle for this Court to resolve the constitutionality of loitering laws and other similar efforts to reduce crime by policing disorder. A decision from this Court on the constitutionality of Chicago's ordinance would provide needed guidance not only to the Illinois courts, but also to courts and legislatures across the Nation that are considering the legal ramifications of the new policing. The Illinois Supreme Court expressly recognized that "[c]riminal street gangs are an expanding cancer in our society and their illegal activities endanger the safety of many law-abiding citizens." Pet. App. 17a. Yet, through a transparently fallacious analysis of this Court's cases, the court below disabled the citizenry of Illinois from dealing effectively with that "cancer." Only this Court's intervention can restore uniformity to this important area of federal constitutional law, which, perhaps more than any other, touches the day-to-day lives of our citizenry. This Court should grant certiorari to declare firmly that the Due Process Clause does not prevent the people from reclaiming their communities.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

Groups Comprising *Amici Curiae*
Chicago Neighborhood Organizations

The Resurrection Project
United Neighborhood Organization
West Woodlawn Council of Block Clubs
Hegwisch Community Committee
Chicago Roseland Coalition for Community Control
South Chicago Chamber of Commerce
Ravenswood Community Council
Nobel Neighbors
Hermosa Community Organization
Reach Out and Touch Ministries
West Humboldt Park Family and Community
Development Council